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NO. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM J. BOURJAILY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Sixth Circuit Court of Appeals

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QUESTIONS PRESENTED

I. Whether there was sufficient evidence for the Court to conclude that the petitioner and his co-defendant were co-conspirators and that, as such, certain statements made by and to this co-defendant were properly admitted under Rule 801 (d) (2) (E).

II. Whether the admission of considerable evidence showing the content of various conversations had by a crucial prosecution witness with third parties (here, a non-testifying co-defendant and another unknown person) violated the petitioner's right of confrontation.

III. Whether a conspiracy to violate the narcotics laws can be properly inferred from facts which at best only show a single isolatable transaction between a purchaser and a seller, where the latter was acting for and on behalf of himself and a Government informant (who actually supplied the contraband involved).

IV. Whether a conspiracy to violate the narcotics laws and a related illegal possession charge are established by proof that does not furnish a constitutionally sufficient basis to support a finding of guilt beyond a reasonable doubt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, William J. Bourjaily, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause. The judgment referred to affirmed petitioner's conviction in the District Court for the Northern District of Ohio for the crimes of Conspiracy (21 U.S.C., §846) and Possession Of Cocaine With Intent To Distribute (21 U.S.C., §841 [a] [1]).

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 781 F.2d 539 (6th Cir. 1986), and is set forth in the Appendix, infra, p. A 1. No opinion was delivered in the District Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Court of Appeals affirming petitioner's conviction was filed on January 15, 1986. On March 10, 1986, Justice O'Connor extended the time for seasonably filing a Petition For Writ Of Certiorari to and including April 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Sixth Amendment, United States Constitution.

(2) 21 U.S.C. §841 [a] [1].

(3) 21 U.S.C. §846.

(4) Rule 29 (a), Federal Rules of Criminal Procedure.

(5) Rule 104 (b), Federal Rules Of Evidence.

(6) Rule 801 (d) (2) (E), Federal Rules of Evidence.

STATEMENT OF THE CASE

William Bourjaily, the petitioner herein, was tried and convicted for the crimes of conspiring to possess and distribute, 21 U.S.C. §846, and for the possession with intent to distribute 21 U.S.C. §841 (A) (1), the drug cocaine. By this petition various evidentiary rulings made by the trial court and validated by the Sixth Circuit are challenged as having authorized the jury to consider as proof of guilt considerable evidence, the admission of which violated petitioner's right of confrontation.

STATEMENT OF THE FACTS [1/]

The facts upon which the convictions of William Bourjaily rest show simply that the Government dealt him into a so-called conspiracy solely on the basis of certain direct evidence that only showed him in the parking lot of a Hilton Hotel where he was seen in one spot and then moved to another. There he engaged in a brief conversation with Angelo Lonardo, his co-defendant at the trial, who had by then emerged from the Hotel lobby. Following this conversation Angelo Lonardo retrieved from the car of Clarence Greathouse, the informant, a package containing the "kilogram" of cocaine (involved in this case). Lonardo either put it in Bourjaily's car behind the front seat (as testified to by the agent closest to the event) or handed it to Bourjaily (as testifed to by another agent more distant from the event). See Tr. 796, 804-808.

Bourjaily's arrest was immediately consummated following the above occurrences. And, when the officers seized and searched the car Bourjaily was driving, they found twenty thousand dollars ($20,000.00), more or less, and other property all of which was confiscated by the Government. Also, the agents confiscated a lesser sum of money from this petitioner's person. None of these funds have been returned or forfeited in accordance with due process, which raises the specter that the Government has simply confiscated these funds on their own authority.

On the other hand, the circumstantial evidence admittedly shows a considerable number of conversations between the Government agent provocateur (Greathouse) and Angelo Lonardo. Many of these were played for the jury over our vigorous and

1/ References to the transcript of proceedings will be designated by the prefix "Tr".

persistent objections (Tr. 22-24, 31, 41). These conversations distill into a showing of extensive past drug dealings between those two. And, they show the efforts undertaken by them was to sell a kilogram of cocaine to a number of buyers. The money required to swing the transaction ostensibly was to be pooled by Lonardo into a sufficient fund. Also, Lonardo was to collect the balance of the money due over the initial down payment and then there would be an ultimate accounting between Lonardo and Greathouse.

Proof this is so follows from the fact that in the midst of the various taped Lonardo-Greathouse phone conversations, Lonardo made numerous references to his getting "people" together who were interested in buying some cocaine from him. This obviously was to be in direct proportion to the amount of money they would invest.

Significant too is the fact that there was no proof of any sort that Bourjaily ever talked to Greathouse about anything or to Lonardo about any drugs. Even this is not all. There was no proof offered that any of the money involved in any aspect of the transaction was contributed by Bourjaily or that he was to be one of those to whom Lonardo would be selling portions of the cocaine.

Indeed, the only evidence the Government can even now argue connects Bourjaily to the sale or sales Lonardo intended to make for himself and Greathouse is the statement made by Lonardo that his friend would be in the parking lot. But this clearly ambiguous statement is hardly the type of stuff that makes one privy to any criminal conspiracy. Here reference is being made to the taped conversation replicated in Government's Exhibit No. 13 (A). As the transcript of the Exhibit, (which was played for the jury) shows, Lonardo told Greathouse that he would be in the

hotel lobby and that Greathouse should just come on in and give him (Lonardo) the keys to the car. Lonardo then added "my friend will be out in his car and I'll just go over and you know ...." (See Government's Exhibit 13 [A]).

The Record here shows that even as to this particular statement, it was the Government's view that it was admissible "as to how they were going to proceed with this present deal, and Lonardo's instructing as to how the proceeding is going to go forward so that it is in furtherance of the conspiracy charged in the indictment." (Tr. 23-24).

Our specific response, which further illustrates the chief issues in this case, was the following comment:

> MR. WILLIS: "I might add, your Honor, that the conspiracy that Mr. Greathouse is talking about supposedly with Mr. Lonardo is a conspiracy betwen those two parties, and insofar as Mr. Bourjaily is concerned this reference is to some past conspiracy.
>
> And even if it [were] otherwise admissible for the purpose suggested by counsel, I think under Rule 403, the probative value insofar as the charges against Mr. Bourjaily is surely outweighed by the prejudicial impact of that evidence." (Tr. 24).

The extent to which this petitioner was wronged by the admission of the evidence above is amplified by a specific objection that goes to the heart of this petition. What counsel had originally stated, in making his objection, was that aspects of Lonardo's previous dealings with Greathouse were inadmissible against this petitioner. What counsel stated was:

> MR. WILLIS: Yes. I don't see how it's even possible that these conversations could ever be a part of a conspiracy yet to be formed, assuming one was eventually formed, in which Mr. Bourjaily and Lonardo were members.
>
> And he's being grievously harmed by this type of testimony which shows, if it does, some relationships between Mr. Lonardo and Mr. Greathouse in which he is not privy to, should not be affected by in any way.

> So I feel, your Honor, that we ought to be severed out of this case at this point because it can only get worse given the fact that the indictment charges a conspiracy in which Mr. Bourjaily could have only possibly entered on the day that the alleged sale took place.

(Tr. 22-23.)

Further evidence that was presented significant to this petition emerges from the Government's direct examination of Greathouse. Here Greathouse testified that he "was to purchase the cocaine ... and ship it to Lonardo and his buyers" (Tr. 28). While the cost to him was between $21,000.00 and $25,000.00, he and Lonardo agreed they would charge $31,000.00. To this he repeated "Mr. Lonardo was to line up his buyers" (Tr. 29).

At another point Greathouse amplified his deal with Lonardo by emphatically stating that:

> Mr. Lonardo was supposed to go out and call his people ... his buyers of cocaine ... he was supposed to line them up for the cocaine that ... [was] on order to be received. (Tr. 33).

This testimony validates counsel's arguments that constantly bombarding the jury with tapes showing Lonardo's conversations with Greathouse was improper and indefensible. The same was true, in our judgment, of testimony by various agents as to the considerable evidence bearing on the relationship between Lonardo and Greathouse.

Typically the objections registered in the following quote are reflective of the position maintained throughout this case:

> MR. WILLIS: I am reemphasizing the objections that I made earlier in connection with the testimony of Mr. Greathouse concerning these prior conversations he supposedly had with Mr. Lonardo, whether taped or untaped, recorded or unrecorded ....
>
> I continue to maintain that no conspiracy has been shown. But even if we assume that a conspiracy existed between Lonardo and Bourjaily, the inception couldn't possibly be ... before when the phone call was made in

> which some stranger was on the phone, [May 25] that would be the inception of the conspiracy. (Tr. 598-599). (Emphasis supplied.)

The Court's response was to simply verify that we had a continuing objection (ibid). While there was testimony by other agents bearing on their surveillance of Lonardo and of Bourjaily in the motel lot, the basic fact pattern would not be altered by any specific reference to their evidence. For the issues here being raised are sufficiently backgrounded by those facts outlined above.

Thus it was that the trial court concluded a conspiracy existed in which Bourjaily was a member and for that reason all the evidence conditionally admitted could be properly considered as it was against the petitioner by the jury (Tr. 989).

II

The Court of Appeals, in addressing our confrontation arguments, thoroughly misread the facts in this case. If not that, then they simply chose to ignore the undeniable thrust of certain indisputable facts.

In documenting the above assailment, the Court should note that as the Court of Appeals saw it, the Record will show:

> (1) "Greathouse testified that he arranged to transfer one kilogram of cocaine to Angelo Lonardo to be sold by 'people' Lonardo was to select"

Bourjaily, p. 541, Appendix "A", p. 3.

> (2) "Lonardo indicated that he talked to 'the people' and they were interested. He then stated that the deal would be handled as had been done in the past. Later in the conversation, Lonardo said that he would 'try to set some people up.' He stated that his contacts did not know that Greathouse was his supplier and Lonardo wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery

and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed."

Ibid, and id., at 3.

The Court of Appeals' assessment of these tactics to the contrary, notwithstanding, there is absolutely nothing in the Record, nor has there ever been even the slightest contention made by the Government, that Lonardo was attempting to do anything other than sell the cocaine in quanities of one quarter kilos at a price fixed by Greathouse for their benefit. Indeed there is nothing in this Record to support even a suggestion that the people Lonardo would be selling to would in turn be selling or distributing the drugs for Lonardo.

Indeed at one point the Court of Appeals gave off an indication that they understood the different people Lonardo had lined up were being regarded as buyers. Otherwise the Court's reference to them as "Lonardo's buyers" makes no sense at all.

Since Bourjaily, if he was shown to have been criminally involved in anything, could only have been one of these buyers, the Court's further statement that "Lonardo's conversations with Greathouse establish that Greathouse was to supply the cocaine and Lonardo was to line up buyer/distributers and obtain partial payment from them" (Bourjaily, at p. 542 and id., p. 4) is really meaningless. What makes even less sense is the Court's very next statement that these conversations proved the existence of "the conspiracy and Bourjaily's membership" therein.

At the risk of being labelled disrespectful to the Opinion writer, what has been overlooked, if not ignored, is that for the Court's analysis to be correct then, contrary to what had always been viewed as dogma, in the Sixth Circuit at least the existence of a conspiracy can be inferred from the conversations between an informant who solicits an unsuspecting individual to find some buyers to purchase on partial credit a fixed quantity of cocaine

-- here a quarter kilo. And, the Court seems equally oblivious to another reality. If the original conversations between Greathouse and Lonardo established the existence of a conspiracy at that point, which obviously was before Lonardo even had a chance to find any potential buyers, then the Court must be regarding Greathouse as a conspirator. This, of course, he could not possibly be -- for the very obvious reasons stated in United States v. Debright, 742 F.2d 1196, 1198-1199 (9th Cir. 1984) and United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

Simply put, there is no logic available to support the required conclusion that Greathouse and Lonardo formed a conspiracy that was joined by William Bourjaily.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF WRIT

At the core of the arguments made in this Petition, which supply cogent reasons why this cause should be reviewed, is the indefensible notion expressed by the Sixth Circuit with reference to the very serious confrontation and sufficiency problems involved. Indeed, our analysis shows that although it is clear beyond dispute that the jury was allowed to consider a vast quantity of hearsay evidence, the admission of which also violated Petitioner's right of confrontation, the Sixth Circuit's opinion simply cannot be squared with views previously expressed by this Court.

Indeed, the Sixth Circuit's opinion misunderstands and distorts an essential requirement of independent proof of the existence of a conspiracy and an accused's membership therein. This it does by expressly and boldly sanctioning the bootstrapping of obvious and unmistakable hearsay evidence by allowing it to demonstrate the satisfaction of the precedent conditions required for its own admission. See United States v. Bourjaily, 781 F.2d, at 542; Appendix "A", at p. 4 .

The above points aside, still other gross fallacies appear in the Sixth Circuit's analysis of the issues in this case. Most of these will surely be repeated in the Government's response, but in a way that will leave totally unobscured the flawed reasoning patterns indulged in by the Courts below. Here reference is being made to, among other things, the Sixth Circuit's fluorescent failure to recognize (in the formation of what will surely become known as the rule in the Sixth Circuit) that even when judged by their bootstrapping rule the assailed evidence was improperly admitted.

This follows because, as was shown in the arguments below the statements attributed to the primary non-testifying declarant

in this case falls into, at least, two catagories. First, there are the conversations had by Lonardo with Greathouse, whereby they were discussing their own deal. This was said to entail Greathouse providing cocaine that would be sold through Lonardo to various individual buyers on terms fixed by Greathouse. There was no evidence to show the potential buyers had combined to make a joint purchase. Next, there are the conversations supposedly had between Greathouse and Lonardo in which Lonardo is credited with saying a "friend" would be in the parking lot where the transaction or exchange was to take place.

With these facts in place the issue quickens. What is it about their development which shows a conspiracy between Lonardo and Bourjaily? And, assuming a conspiracy can be said to exist despite their seller-buyer relationship (if indeed the evidence shows that) when was its birth and who were its members? If the proof does establish that Bourjaily was the "friend" who talked to Greathouse, and if he could not conspire with Lonardo, who could he have conspired with?

The Sixth Circuit has failed to answer these questions, the answers to which are critical to the determinative issues in this case. If nothing else, the Government will show and tell us under what evidentiary theory the original conversations Lonardo had with Greathouse became admissible against William Bourjaily. Certainly they cannot agree with the Sixth Circuit that William Bourjaily's actions in the parking lot proved the existence of a conspiracy, which made the conversations Lonardo had with Greathouse admissible against William Bourjaily.

Not even the Government would dare to make that argument to this Court.

ARGUMENT NO. I

There Was Insufficient Evidence For The Court To Conclude The Petitioner And His Co-Defendant (One, Angelo Lonardo) Were Co-Conspirators And That, As Such, Certain Statements Made By Lonardo And To Lonardo Were Properly Admitted Against The Petitioner Under The "Co-Conspirator's Exception To The Hearsay Rule" Or Its Counterpart, Rule 801 (d) (2) (E), Federal Rules Of Evidence.

The argument here being made is potentially dispositive of this entire case. Being raised is the question that, assuming Angelo Lonardo said and did everything the Government's proof attributes to him, what is it about this that makes Angelo Lonardo a conspirator with William Bourjaily?

The law on this point is beyond dispute. A conspiracy and one's membership therein (either as a foundation for the admission of declarations assertedly made in furtherance thereof, or as a criminal offense) cannot be established on the basis of hearsay statements. Rizzio v. United States, 304 F.2d 810, at 826 (8th Cir. 1962). And, just as surely (as argued below, infra, p.23 to 26), the relationship of buyer and seller, in a single transaction such as we have here, is not properly described as conspiratorial.

Distilled, the Government's theory was that Lonardo and Bourjaily were conspirators and that, as such, the various conversations had by Lonardo with Greathouse, the informant, were properly admitted against Bourjaily as statements made in furtherance of such conspiracy. United States v. Enright, 579 F.2d 980 (6th Cir. 1978). Indeed, in rejecting the present

challenge against this evidence, the trial court in denying our specific objections articulated the conclusion that, in his judgment at least: a conspiracy had been shown by a preponderance of the evidence, and that the statements were therefore admissible (Tr. p. 989).

To begin with, as will be argued below, the evidence was grossly insufficient to show that Angelo Lonardo and William Bourjaily were co-conspirators. And, just as surely, the evidence does not show Bourjaily was involved in any way in the pseudo-joint venture then being fostered and promoted by Greathouse and Lonardo, which could impute criminality on any theory to Bourjaily -- with impunity. See, United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

Dealing specifically with the relationship between Angelo Lonardo and Greathouse in search of definition, several facts seem clear. One, indisputably Greathouse and Lonardo as a team sought to sell a kilogram of cocaine to any purchasers Lonardo could deliver. Thus, even if Bourjaily was to be one of those to whom Lonardo intended to make a sale (and we deny this was proven) such would not put Bourjaily in a conspiratorial relationship with Lonardo as their intent would not be common and could hardly be deemed as anything other than a buyer and seller relationship.

This analysis is fully consistent with the Government thesis under which this case was prosecuted. Indeed the Government in specifically addressing these contentions argued to the trial court (Tr. 973-981) that:

> The Government's position is that the outline of how the conspiracy was to develop during the course of events between May 12th and May 25th were outlined by Lonardo when Lonardo said, "But this coming week I will try to contact some people. See, they don't know who I'm talking to. I don't want them to know."

So from the very beginning, Lonardo has indicated by his conversation that was recorded that the conspiracy would exist, that he would be contacting at least one other person, whether it be two, three or four.

* * *

So the parameters of how the delivery was to take place as part of the agreement was also outlined initially. Greathouse said, "I want half up front. We can sell it for 30." So there is an agreement as to cost.

Greathouse wants his money half up front and they are agreeing to sell the cocaine for $30,000. To show that Lonardo did fulfill his part of the conspiracy, */ that it was existing, on May 24th he indicated that he would have to recontact the people, like he said on the 12th, "I will contact people." He confirmed that he did in fact contact people by his statement on the 24th when he said, "I will have to recontact some people." Lonardo further said on the 24th that the delivery would take place someplace other than the Sheraton hotel. On the 25th we have the conversation, "I have a gentleman friend of mine here now and he has some questions to ask you about the trees."

So independent of what that third, second phone conversation indicated, and outside the credibility of Clarence Greathouse, we have Lonardo saying that he had a gentleman friend here and he wants to talk about cocaine. The third conversation Lonardo said, "I'll be in the lobby, you can bring in the key, the car key, and my friend will be out in his car and I'll just go over and, you know." And we can infer from that that the delivery was to take place in that fashion.

Tr. 985-987. (Emphasis added.)

*/ What counsel for the Government and tragically the Court of Appeals, as well, fail to understand is that no conspiracy could possibly be formed between Lonardo and Greathouse. This is so because an illegal agreement between them so as to make for a conspiratorial relationship was simply not possible. See, United States v. Elledge, supra. Worse yet, they fail to understand that the point of the conversations between Lonardo and Greathouse related to future causes of action and to that extent antedated any possible conspiracy that included Bourjaily as a member.

Again it was on the basis of the facts, which are sufficiently referred to in the various statements made above, that the Court concluded that "a conspiracy did exist" as between Lonardo and Bourjaily and that the "hearsay statements were made in furtherance of the conspiracy" (Tr. 989). In our judgment, the ruling of the Court to the contrary, notwithstanding; it seems clear enough that the circumstances here only show that Lonardo was acting in combination with Greathouse as a seller. Indeed, the conversation about what "we" could sell the cocaine for does not reasonably lend itself to a deal whereby Lonardo was buying the cocaine for himself at one price and selling it for another. The facts show Lonardo's understanding to have been that he and Greathouse were purchasing it for one price and selling it at a higher price and reaping the profit. (Tr. 28-29 and 80-81.)

The legal theory that emerges from these facts, and which must be credited, verifies that Lonardo can only be regarded as a seller and a joint venturer with Greathouse rather than a purchaser from Greathouse. This being so, Lonardo could not in this sense be regarded as having conspired with Bourjaily to purchase as there could be no meeting of the minds in the required sense unless one could conspire with himself to purchase from himself, which is what Lonardo would have had to do.

Even this is not all. If the relationship between Bourjaily and Lonardo was that Bourjaily was going to make a purchase from Lonardo (-- that is, was to be one of those to whom Lonardo would be selling on behalf of himself and Greathouse) this would not put Bourjaily into a conspiratorial relationship with Lonardo and Greathouse. Nor would it put him in a conspiratorial relationship with any other possible purchasers from Lonardo. For as was argued at the trial, at best Bourjaily

would only be a spoke on what could be deemed a wheel that had Lonardo and Greathouse at the hub.

Simply put, the rule relied on by the Court in admitting the evidence herein being assailed was to the effect that any act or declaration by one co-conspirator committed in furtherance of any conspiracy and during its pendency is admissible against each and every co-conspirator. Admittedly, this is so provided a foundation for its reception is laid by independent proof of the conspiracy and the membership therein by the person against whom such evidence is being offered. Crediting this principle, it is at once apparent that the evidence against which we complain failed all tests.

Viewed in this sense, it surely must be that the jury that convicted Bourjaily was able to rely on improper evidence to determine that a conspiracy existed (if, in fact, it showed that) and then use such proof to bootstrap evidence that would otherwise have been inadmissible into proof of guilt. See United States v. Glasser, 315 U.S. 60, 74-75 (1942).

Since the Government's thesis that there was a "conspiracy" permeated this entire trial, a determination by this Court that none was shown to exist that included Bourjaily as a member should perforce automatically require a reversal here as to the substantive counts.

ARGUMENT NO. II

The Admission Of Considerable Evidence Showing The Content Of Various Conversations Had By A Crucial Prosecution Witness With Third Parties (Here, A Non-Testifying Co-Defendant And Another Unknown Person) Violated The Accused's "Right Of Confrontation".

A. What is required for statements made by a non-testifying declarant to be admissible is proof that such statements were made in furtherance of a conspiracy in which the person against whom it is admitted was a member.

We concede that extrajudicial statements made by a non-testifying declarant may be admitted if it is established, by evidence other than such hearsay, that the accused (here, William Bourjaily) was involved in a conspiracy with the declarant (in this case, Angelo Lonardo) and that the statements were made in furtherance of such conspiracy. See Federal Rules of Evidence, Rule 801 (d) (2) (E). This rule, which certainly is not of recent vintage (Lutwak v. United States, 344 U.S. 604 [1953]), does not exist as though oblivious to values implicit in the "accused's right to be confronted by the witnesses against him".

The fact that these values must be reckoned with in a meaningful way was made most clear in California v. Green, 399 U.S. 149 (1970). Here it was noted that "more than once [the Court had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception" (id., 155).

In our case we are primarily concerned with the statements and acts of Angelo Lonardo, statements which were made a part of the evidence used to convict Bourjaily. More specifically, and to context this argument, it is undisputed that the evidence includes conversations (some of which were taped) had on various dates between Angelo Lonardo and Clarence Greathouse. The narcotics transaction, which the Government contends specifically involved Bourjaily, took place on May 25, 1984. The question then is, how can the Government justify the admission of evidence concerning the activities and conversations of Angelo Lonardo and Clarence Greathouse prior to this event?

On the other hand, it may suffice simply to note that the only possible proof William Bourjaily and Angelo Lonardo were even acquainted distills from the fact that they obviously conversed before the cocaine was placed in the Bourjaily car. But this fact only shows their "mere association," which is hardly proof of criminal conduct. Stated another way, the fact referred to surely does not establish them as being conspirators, which would make everything Lonardo may have done, and said, imputable to Bourjaily. (See Arguments Made To Trial Court, Tr. pp. 93-97.)

Indeed the very first indication, even remotely resembling evidence, of an acquaintanceship between Angelo Lonardo and William Bourjaily flows from Lonardo's statement to Greathouse that his "friend will be in his car" (Tr. 112-113 & Exhibit 13 [A], Also see Tr. 916), and it turned out later that William Bourjaily was shown to have been in his car in the parking lot. Obviously it is a cogent argument that contends merely because Lonardo made this reference to a "friend" does not prove the reference was to Bourjaily or that he and Bourjaily were conspirators. See United States v. Cantrone, 426 F.2d 902 (2d Cir. 1970).

B. Where evidence originating with a non-testifying declarant is offered against an accused, the prosecution must demonstrate such evidence has an independent "indicia of reliability".

Again, the thrust of petitioner's arguments is that the jury's consideration of the testimony detailing the conversations had between Angelo Lonardo and Clarence Greathouse violated both his right of confrontation and the hearsay rule. In making this argument we rely on the point made in the plurality opinion in Dutton v. Evans, 400 U.S. 74 (1970), that "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the facts [has] a satisfactory basis for evaluating the truth of the prior statement." (Id., 89).

The statements made by Angelo Lonardo contained the implied assertion that William Bourjaily was somehow involved with him in the narcotics transaction. The truth of this implication depends not only on whether Angelo Lonardo made the statements, but on whether the statements (if made) were reliable. These questions turn on the answers as to [1] whether there was "a satisfactory basis for evaluation" of their truth (California v. Green, 399 U.S. at 161); [2] whether cross-examination could have possibly exposed the statements, if made, to be unreliable (Dutton v. Evans, 400 U.S., at 89); and [3] whether the statements themselves contained a sufficient "indicia of reliability" (Ibid).

Obviously William Bourjaily, like the defendant in Dutton, was only able to cross-examine the witness (Greathouse), who purportedly was quoting non-testifying declarants on the factual

questions as to whether the witness actually and correctly heard the alleged statements which arguably implicated the accused. However, neither the Government nor the defense were able to cross-examine the alleged declarant.

In the context of this case the confrontation clause guaranteed William Bourjaily, since he could not cross-examine any of the asserted declarants (e.g., Angelo Lonardo), that he (William Bourjaily) should have a satisfactory substitute for testing the accuracy of the statements imputed to such declarant. The Government, under Dutton, was also required to demonstrate that evidence of this type had such an independent "indicia of reliability" that cross-examination would serve no useful purpose. 400 U.S., at 88-89.

What we have here is specific evidence which shows beyond dispute that William Bourjaily was in no way involved in the transactions as a result of which Angelo Lonardo purchased cocaine, or received samples of cocaine, from Clarence Greathouse prior to May 25, 1984.

On the other hand, it is conceded that to a degree some of the statements attributed to Angelo Lonardo were verifiable by the accuracy of the tapes. But even this does not furnish a satisfactory basis for crediting the underlying truth of the statements themselves. And, of course, even if Angelo Lonardo in fact made all of the statements attributed to him, still there are a number of possible reasons for the insertion of the existence of another person referred to as "a friend" of his, which the Government arbitrarily fleshed into being William Bourjaily. These include the idea that Lonardo had his own reasons for wanting to make it known to Greathouse that he would have someone with him.

C. The admission of extrajudicial statements imputed by a prosecution witness to a non-testifying declarant (as having been made in furtherance of the charged conspiracy), which statements were "crucial" to the prosecution and "devastating" to the defense, made for a violation of the right of confrontation.

As to this proposition, it is beyond dispute the same consideration which generates the hearsay rule supports and animates the right of confrontation. Yet, it seems to be all too clear that any apparent similarity of values as between the rule and the right, does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

In dealing with this specific point this Court, in California v. Green, 399 U.S. 149, 155 (1970), clearly appears to be saying that merely because certain evidence can be fit into a hearsay exception such does not perforce provide a constitutionally sufficient protection for the right of confrontation.

In our judgment, the absence of an automatic rule of equivalence between the hearsay rule and the right of confrontation requires an assessment here as to the extent to which confrontation values may have been violated by the admission against Bourjaily of the statements made, and supposedly made, by Lonardo and some unidentified declarant. Here of course, it is obvious Angelo Lonardo, one of the asserted declarants, could not be subjected to cross-examination. This

would have at least exposed his demeanor, and possible lack of credibility, to the scrutiny of the jury. Hence, the "mission" of the confrontation clause (usually insured by cross-examination) could not be vindicated here.

However, it is also true that a failure to serve this confrontation value may not be fatal where the hearsay testimony is neither "crucial" to the prosecution, nor "devastating" to the defense. Dutton v. Evans, 400 U.S., at 85, 87 (1970). Of course, it could not be more obvious that the evidence assailed here was both "crucial" and "devastating". Not only this, unlike the statements made in Dutton, the statements made here were not spontaneous, but were in the form of an expressed assertion that in no way carried with it a caution against it being given undue weight (id., 87-89).

For these reasons the admission of these assailed statements must be viewed as a violation of the confrontation clause.

ARGUMENT NO. III

A Conspiracy To Violate The Narcotics Laws Is Not Properly Inferred From Facts Which At Best Only Show A Single Isolatable Transaction Between A Purchaser And A Seller, Where The Latter Was Acting For And On Behalf Of Himself And A Government Informant (Who Actually Supplied The Contraband Involved).

In this case the original indictment charged Lonardo and Bourjaily with involvement in a conspiracy dating from May 1[illegible], 1984 to the date of the indictment. Of course, it is now clear this was done so as to facilitate the Government's use as evidence against Bourjaily, of conversations supposedly had between Lonardo and Greathouse that did not in any way involve Bourjaily.

The fact that the Government at all times knew Lonardo was acting as an agent for Clarence Greathouse, the informant, and that the effort Lonardo was ostensibly making was to sell the drugs for Greathouse, really makes our point. Clearly then it can only be that Lonardo was a seller of these drugs not a purchaser thereof from Greathouse. Simply put, we are indeed here contending that the facts only showed Lonardo was clearly making the effort to sell these drugs for himself and Greathouse (Tr. 28-29 and 80-81) or for himself at a price higher than what he would have to pay Greathouse. This hardly puts one who would only be a purchaser from Lonardo into a conspiratorial relationship with Lonardo or anyone else who might also buy from Lonardo.

All this aside, the most crucial aspect of the conspiracy issues in this case (-- that is, as a predicate for the admission of statements supposedly made in furtherance thereof, and as

proof of a conspiracy offense) deals specifically with the sufficiency of the Government's proof of a conspiracy. Here, we start with the rather basic tenet that the mere purchase of contraband by one party from another is insufficient to prove the existence of a conspiracy as between such parties. Indeed, as the Second Circuit cogently recognized in a comparable situation:

> The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators.

United States v. Koch, 113 F. 2d 982, 983 (2d Cir. 1940). Also See United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943).

So postured, the admission against Bourjaily of the Greathouse-Lonardo conversations had before May 25th stands on even less footing. For no connection between Lonardo and Bourjaily has even been suggested by the Government as being in existence before that date. In fact, the total range of the proven contacts as between Lonardo and Bourjaily does not establish there had even been an acquaintanceship between them prior to this date.

United States v. Ford, 324 F.2d 950 (7th Cir. 1963), is another case adopting the Koch analysis. In Ford, the Court likewise concluded that "the relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of ... [contraband]." Id., at 952. Also See United States v. DeNoia, 451 F.2d 979, at 981 (2d Cir. 1971) and United States v. Sperling, 506 F.2d 1323, at 1342 (2d Cir. 1974).

Indeed our own Court, in United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977), at least recognized the apparent validity of the argument that "a buyer-seller relationship is not

alone sufficient to tie a buyer to a conspiracy" (id., at 1235). While the trial Court rejected the argument as postured by the facts in Grunsfeld, it is at least arguable that the Court would have done otherwise had it been unable to "conclude that all of ... [the] circumstances distinguish the involvement ... [in that case] from that of a mere casual sale by someone who was unaware of the scope of the conspiracy" (id., at 1235).

In the wake of the above arguments, we contend the Court below failed to understand that the essential question in this case turned on whether an ultimate purchase by Bourjaily of an indeterminate quantity of cocaine from Lonardo was "the kind of single transaction which itself supports an inference of knowledge of a broader conspiracy" that could be imputed to Bourjaily. See United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974). Here, it should be noted that in the Sperling case the Court was careful to point out that there were certain types of single acts that could be sufficient for that purpose. On this precise thesis the Court articulated the idea that:

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotic laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred.

Id., 1342.

What is significant is that if the single act of actually delivering cocaine to another person, the situation in Sperling, was insufficient to transform that act into a conspiratorial relationship, the question then is what is present here that takes this situation out of the ambit of the stated principle. Also See United States v. Solomon, 686 F.2d 863 (11th Cir. 1982), and United States v. Torres, 503 F.2d 1120 (2d Cir. 1974).

Viewed from still another posture, the Record here simply fails to show any unusual circumstances from which it could be inferred that these parties (including Bourjaily) agreed to further some joint interest. Indeed, the absence of any "stake in the venture" Lonardo had with Greathouse cannot be regarded as irrelevant to the question of conspiracy. This being so, the critical issues raised under this argument surely must be resolved in favor of this petitioner.

ARGUMENT NO. IV

A Conspiracy To Violate The Narcotics Laws And A Related Illegal Possession Charge Are Not Established By Proof That Does Not Furnish A Constitutionally Sufficient Basis To Support A Finding Of Guilt Beyond A Reasonable Doubt.

In this case our petitioner, William Bourjaily, seriously urges that the evidence against him is, and was, insufficient as a matter of law to support his convictions. Granted, in assessing this contention the Court will view the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942).

Be all that as it may, our concentration on this issue starts with the flat-out contention that the evidence bearing on sufficiency issues cannot properly include the considerable testimony admitted by the Court on the theory that a conspiracy existed as between William Bourjaily and his co-defendant at the trial -- Angelo Lonardo. This evidence, needless to say, was admitted over our objections.

At least this much seems clear enough, before admitting the evidence here being referred to against William Bourjaily (--

here, the considerable evidence based on conversations between Lonardo and Greathouse), the applicable rule required that the non-hearsay testimony should have demonstrated, by a fair preponderance, that William Bourjaily participated in a conspiracy with Lonardo. The fact that no conspiracy can be said to have existed as between Lonardo and Greathouse, United States v. DeBright, 742 F.2d 1196 (9th Cir. 1984), really puts the issue here in its proper perspective. Also See United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984) and United States v. Renfro, 620 F.2d 569, 575 and n. 5 (6th Cir. 1980).

All this being so, we are faced with certain indisputable facts. One, there was no evidence that William Bourjaily accompanied Angelo Lonardo to the hotel or knew of his dealings or arrangements (past or present) with Greathouse. And, two, there certainly was no evidence he knew of Lonardo's intent to pick-up the kilogram of cocaine. What the evidence did show as against William Bourjaily in this connection was his presence in the parking lot. There he was later joined by Lonardo who caused the package to be in Bourjaily's car where it was found by the agents along with a package of Twenty Thousand Dollars ($20,000.00) plus. This evidence is really beyond dispute.

Thus it should suffice to note that Bourjaily's actions were at least as consistent with innocence as with guilt and, as such, does not lead to any fair inference implicating him in any conspiracy with Lonardo. Stated another way, the conclusion that the non-hearsay evidence proffered by the Government at best would support only the speculative conclusion that Bourjaily was a conspirator seems inescapable.

If this conclusion is valid, then surely the admission of the evidence being centralized was a serious violation of Rule 801 (d) (2) (E) that was prejudicial to a fault. This being so, it perforce follows that the conspiracy conviction itself must

surely fall in the wake of these cogent determinations. Even this is not all, the admission of this evidence, which also included the statement made by Lonardo that his friend would be outside in the car (Exhibit 13 [A]), surely prejudiced the jury's consideration of the possession charge.

(B)

In this case, to prove the charged possession with intent to distribute, it was necessary for the Government to present evidence showing William Bourjaily (1) knowingly (2) possessed the cocaine involved in this case (3) with the intent to distribute it. See 21 U.S.C. §841 (a). The relevant inquiry turns on whether Bourjaily had an "appreciable ability to guide the destiny of the drug[s]," United States v. Staten, 581 F.2d 878 (D.C. Cir. 1978).

Perhaps it will be conceded by counsel opposite that, while an individual can surely possess contraband jointly with another, one's mere presence in, or operation of, a car when drugs are placed therein, or even one's association with one whose possession is established, is insufficient to establish the type of possession needed for a conviction. Id., at 884. Indeed, the Government may also concede that proof merely that a package containing drugs (here, cocaine) was placed in Bourjaily's car by Lonardo, or was handed to Bourjaily who placed it in the car himself, does not eliminate the need for proof that the accused had knowledge of the content of the package.

So postured, the validity of William Bourjaily's conviction on possession with intent to distribute depends upon whether the proof adduced was sufficient to show Bourjaily knew the cocaine was contained in the package when he acquired actual possession -- if he ever did. In our judgment even when one assesses this

evidence most favorable to the Government, as this Court will surely do, the evidence must still be deemed too slim a reed upon which to predicate a criminal conviction. On the other hand, while the proof probably reveals some type of an association (and that's all it reveals) between William Bourjaily and Angelo Lonardo, and may even arguably raise a plausible suspicion of a criminal association by William Bourjaily with Lonardo (whose actual possession of the cocaine has been conceded, indeed, was not even contested); this is hardly the kind of stuff proof beyond a reasonable doubt is made of. See United States v. Jackson, 588 F.2d 1046, 1056 (5th Cir. 1979).

For this reason, and others that will surely occur to the Court, William Bourjaily's conviction on possession with intent to distribute should likewise be reversed for insufficiency of the evidence. See Burk v. United States, 437 U.S. 1 (1978).

CONCLUSION

Perhaps the most unfortunate aspect of this cause was the failure of the Sixth Circuit to recognize that our contentions were two-fold with reference to almost the entirety of the evidence supplied by and through the Government's lackey, Clarence Greathouse. Specifically, it was claimed that the evidence referred to was inadmissible hearsay within the meaning of Rule 801 (d) (2) (E). And, its admission was also improper because it offended the confrontation clause.

The Government's similar failure, in its Brief, to indicate with any specificity the names or identities of "the conspirators" it relies on and the ends furthered by Lonardo's conversations with Greathouse, which made Lonardo's statements admissible against William Bourjaily will emphasize our point.

For our part, if only one question is considered by this Court, this should be the one. For with its analysis will come an inescapable conclusion. Simply put, this cause must be reviewed and its tenets must be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Kenneth S. McHargh, Assistant U.S. Attorney, Northern District of Ohio, 1404 East Ninth Street, Suite 600, Cleveland, Ohio 44114, this 15th day of April, 1986.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

William John BOURJAILY,
Defendant-Appellant.

No. 85-3058.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 4, 1985.

Decided Jan. 15, 1986.

Defendant was convicted in the United States District Court for the Northern District of Ohio, White, J., of conspiracy to distribute and possession with intent to distribute cocaine, and he appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) codefendant's statements were admissible against defendant under coconspirator exception to hearsay rule; (2) admission of those statements did not violate defendant's confrontation right; and (3) evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law ⇐427(3)

Determination as to whether evidence is admissible under coconspirator exception to hearsay rule need not be made at time questionable evidence is offered; rather, court may wait until government's case is complete before making findings and ruling on admissibility of evidence. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

2. Criminal Law ⇐427(4)

Statements at issue may be considered by court in determining whether statements are admissible under coconspirator exception to hearsay rule. Fed.Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

3. Criminal Law ⇐422(1)

Statements of codefendant in drug prosecution were admissible against defendant under coconspirator exception to hearsay rule; evidence showed that conspiracy existed for codefendant to facilitate drug transaction between police informant and defendant, that defendant, who accepted drugs in hotel parking lot, was part of conspiracy, and that statements were made in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

4. Criminal Law ⇐662.11

Admission of codefendant's out-of-court statements in prosecution of defendant on drug charges, under coconspirator exception to hearsay rule, did not violate defendant's confrontation right, even though defendant could not confront or cross-examine codefendant, who exercised his right not to testify; reliability was established by fact that statements fell squarely within well-established hearsay exception, and codefendant's refusal to testify rendered him unavailable. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

5. Criminal Law ⇐662.8, 662.9

Defendant's right to confrontation is protected if hearsay statement sought to be used against defendant has sufficient indicia of reliability and if declarant is unavailable; reliability prong of test is satisfied where statement falls within firmly rooted hearsay exception, but availability must be separately proved. U.S.C.A. Const.Amend. 6.

6. Conspiracy ⇐23

Essential elements of conspiracy are that conspiracy was willfully formed, that defendant willfully became member of conspiracy, and that one conspirator committed at least one overt act in furtherance of that conspiracy.

7. Conspiracy ⇐44½, 47(2)

Drug distribution conspiracies are often "chain" conspiracies such that agreement can be inferred from interdependence of enterprise, i.e., one can assume that participants understand that they are participating in joint enterprise because success is dependent on success of those from whom they buy and to whom they sell; circumstantial evidence is sufficient to show this agreement.

8. Conspiracy ⇐47(12)

In prosecution for conspiracy to distribute cocaine, evidence that defendant, with codefendant acting as "middleman," took cocaine which codefendant was delivering from police informant, after negotiations between informant and defendant through codefendant, was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

9. Conspiracy ⇐44½

Large volume of narcotics involved in transaction creates inference of drug conspiracy.

10. Drugs and Narcotics ⇐118

In prosecution for possession with intent to distribute cocaine, evidence that defendant, in hotel parking lot, accepted kilogram of cocaine which codefendant had transferred from police informant to defendant, and that $19,000 in cash was found in defendant's car, was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

James R. Willis, argued, Cleveland, Ohio, for defendant-appellant.

Ronald B. Bakeman, Asst. U.S. Atty., Cleveland, Ohio, Gregory C. Sasse, argued, Asst. U.S. Atty., for plaintiff-appellee.

Before LIVELY, Chief Circuit Judge, and MARTIN and JONES, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

William Bourjaily appeals his convictions for conspiracy to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1),[1] 21 U.S.C. § 846[2]

1. 21 U.S.C. § 841(a)(1) provides the following:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

2. See note 2 on page 541.

and 18 U.S.C. § 2.[3] Bourjaily claims that statements of his codefendant, Angelo Lonardo, should not have been admitted as statements of a co-conspirator as provided by Rule 801(d)(2)(E) of the Federal Rules of Evidence. Because Lonardo exercised his right not to testify at trial, Bourjaily claims that even if Lonardo's statements were admissible under Rule 801(d)(2)(E), allowing the statements into evidence violated his sixth amendment right to confrontation. Bourjaily also claims that the evidence was insufficient to support findings of conspiracy and possession.

The majority of the evidence in this case was presented by testimony of FBI agents; testimony of an FBI informant, Clarence Greathouse; and several recordings of cryptic conversations between Greathouse and the codefendant, Angelo Lonardo. Greathouse testified that he arranged for a transfer of one kilogram of cocaine to Angelo Lonardo to be sold by "people" Lonardo was to select. On May 12, 1984, Greathouse, equipped with a body recorder, met with Lonardo to discuss the possibility of a sale. In this taped conversation, Lonardo indicated that he had talked to "the people" and they were interested. He then stated that the deal would be handled as had been done in the past. Later in the conversation, Lonardo said that he would "try to set some people up." He stated that his contacts did not know that Greathouse was his supplier and Lonardo wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed.

Greathouse testified that on May 17, 1984, he asked Lonardo for money and Lonardo responded that he would get in touch with "some people" and recontact Greathouse. He called Greathouse on May 19 to arrange for delivery of the money and the delivery occurred. Several other conversations occurred in the next few days as the deal was being finalized. All of these conversations were recorded. On May 24, Lonardo met Greathouse at the Sheraton Hopkins Hotel outside of Cleveland. Greathouse told Lonardo that the cocaine had arrived. In a taped conversation, Lonardo said that he would try to contact some people but that he had told them the deal was off because of a purchase price misunderstanding.

On May 25, Lonardo, in a taped telephone conversation, told Greathouse he had a "gentleman friend" present who "had some questions" to ask Greathouse. Lonardo indicated that he wanted Greathouse to call back immediately. The second call was not recorded but FBI agent Dorton listened to both sides of the conversation. Greathouse testified that he discussed how the gentleman was to pay, as well as the quality, the purity, the formation and the clarity of the cocaine. Agent Dorton confirmed that these topics were discussed. Later that day, in a taped conversation, Lonardo told Greathouse to park his car behind the Hilton Hotel and that Lonardo would be waiting for him in the lobby. Lonardo stated, "My friend will be out in his car and I'll just go over and you know."

FBI agents Fiatal and Dorton placed four quarter-kilogram bags of cocaine in a Sheraton laundry bag in Greathouse's car. Greathouse parked at the Hilton, entered

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.
Cocaine is a controlled substance.

2. 21 U.S.C. § 846 provides the following:
Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

3. 18 U.S.C. § 2 states the following:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

and stood next to Lonardo. FBI agents Fiatal and Dorton testified that William Bourjaily was in the parking lot in a white car which was facing away from the hotel. Other FBI agents in a surveillance van stationed in the parking lot prior to Greathouse's arrival had observed Bourjaily drive around the parking lot, stop in different areas and examine the vehicles parked there. The agents stated that Bourjaily's car was at the end of the parking lot farthest from the hotel entrance when Greathouse arrived.

Greathouse arrived, entered the Hilton and gave Lonardo the keys to his car. Lonardo took the keys, walked to Greathouse's car, circled the car and walked to Bourjaily's car. Lonardo then walked back to Greathouse's car, unlocked the door, reached under the seat and removed the cocaine. As Lonardo neared Greathouse's car, Bourjaily turned his car around in the parking lot and moved to a point near Greathouse's car. Lonardo took the cocaine from the car and walked to Bourjaily's car. At least one FBI agent saw Lonardo hand the package of cocaine to Bourjaily and saw Bourjaily accept it. The FBI agents then arrested Bourjaily and Lonardo and recovered the cocaine from Bourjaily's car. They found, under Bourjaily's passenger seat, a leather bag containing $19,000 in cash. A receipt found in the bag was made out to Bill Bourjaily. They also found $2,000 in the glove compartment.

[1-3] We believe the trial judge was correct in allowing Lonardo's statements to be admitted as statements of a co-conspirator as provided by Rule 801(d)(2)(E) of the Federal Rules of Evidence, which states:

(d) Statements which are not hearsay. A statement is not hearsay if—
....
(2) Admission by party-opponent. The statement is offered against a party and is ...
(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

We have held that in order to have a coconspirator's testimony admitted, it must be shown by a preponderance that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the statement in question was made in furtherance of the conspiracy. *United States v. Vinson*, 606 F.2d 149, 152 (6th Cir.1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980); *United States v. Enright*, 579 F.2d 980, 986 (6th Cir.1978). This determination need not be decided at the time the questionable evidence is offered. Rather, as the trial court here did, the court may wait until the United States' case is complete before making findings and ruling on its admissibility. *Vinson*, 606 F.2d at 153. The statements at issue may be considered by the court in determining whether the *Enright* requirements are satisfied.[4] *Id.* Here the court specifically found that the *Enright* requirements had been satisfied. We find no procedural error.

Substantively, the trial judge did not err in finding that the government had proved by a preponderance of the evidence that the *Enright* requirements were satisfied. Lonardo's conversations with Greathouse establish that Greathouse was to supply the cocaine and Lonardo was to line up buyer-distributors and to obtain partial payment from them. The conspiracy and Bourjaily's membership in it was preponderantly proved by these conversations, by Greathouse's telephone discussion with Lonardo's "friend" about the quality of the cocaine, and Lonardo and Bourjaily's actions in the Hilton parking lot. After talking with Lonardo, Bourjaily pulled his car nearer Greathouse's car so that the cocaine could be transferred by Lonardo easily. Bourjaily then accepted the cocaine from Lonardo. Lonardo's statements were made in furtherance of the conspiracy because they were recorded from conversations be-

4. The Supreme Court denied certiorari on this issue in *Means v. United States*, — U.S. —, 105 S.Ct. 541, 83 L.Ed.2d 429 (1984). *See also United States v. Martorano*, 561 F.2d 406, 408 (1st Cir.1977), *cert. denied*, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978).

tween Lonardo and Greathouse in which they planned, negotiated, and organized the transaction.

[4] Admission of Lonardo's statements does not violate Bourjaily's sixth amendment right of confrontation, though Bourjaily could not confront or otherwise cross-examine Lonardo because Lonardo exercised his right not to testify. In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court held that the defendant's right to confrontation is protected if the hearsay statement sought to be used against the defendant has sufficient indicia of reliability and if the declarant is unavailable. *Id.* at 65–66, 100 S.Ct. at 2538–2539. The *Roberts* court stated that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66, 100 S.Ct. at 2539. Rule 801(d)(2)(E) provides that statements of co-conspirators are not hearsay for purposes of the rules. However, these statements are out-of-court assertions offered for their truth "and thus resting for ... [their] value upon the credibility of the out-of-court asserter." C. McCormick, *Handbook of the Law of Evidence*, § 246 at 584 (1972). These statements are thus traditionally considered hearsay and squarely covered by the *Roberts* requirements. *See* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U.Fla.L.Rev. 207, 229 (1984).

The circuits are split on the analysis to be followed in dealing with co-conspirator's statements.[5] Several circuits have adopted an approach in which co-conspirator statements admitted under Rule 801(d)(2)(E) are analyzed on a case-by-case basis for reliability and availability. *See United States v. DeLuna*, 763 F.2d 897, 909–10 (8th Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 254–57 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *United States v. Perez*, 658 F.2d 654, 660 & n. 5 (9th Cir.1981); *United States v. Wright*, 588 F.2d 31, 37–38 (2d Cir.1978), *cert. denied*, 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467 (1979).

We have held that evidence admitted as a co-conspirator's statement under Rule 801(d)(2)(E) automatically satisfies the sixth amendment requirements. *Boone v. Marshall*, 760 F.2d 117, 119 (6th Cir.1985); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir.1984); *United States v. Marks*, 585 F.2d 164, 170 n. 5 (6th Cir. 1978); *United States v. McManus*, 560 F.2d 747 (6th Cir.1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 541 L.Ed.2d 798 (1978); *Campbell v. United States*, 415 F.2d 356 (6th Cir.1969). *Accord United States v. Lurz*, 666 F.2d 69, 80–81 (4th Cir.1981), *cert. denied*, 455 U.S. 1005, 102 S.Ct. 1642, 71 L.Ed.2d 874 (1982); *United States v. Papia*, 560 F.2d 827, 836 & n. 3 (7th Cir.1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir.1972), *cert. denied*, 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973). However, none of these cases discuss the implications of the two-pronged test of *Roberts* on our analysis.

[5] In *Fuson v. Jago*, 773 F.2d 55 (6th Cir.1985), another approach was used which applied *Roberts*. In *Fuson* a separate finding of unavailability was made and the panel held that the 801(d)(2)(E) provision represented a "well established" hearsay exception. *Fuson*, 773 F.2d at 59. Though the *Fuson* Court ultimately found that the statement in question did not fit within the exception, we think the bifurcated analysis is proper and more in accord with the *Roberts* requirements. As implied in *Fuson*, the reliability prong of the *Roberts* analysis is supplied by satisfaction of Rule 801(d)(2)(E), a well-established hearsay exception. Availability must be separately proved. *Accord United States v. Peacock*, 654 F.2d 339, 349–50 (5th Cir. 1981), *cert. denied*, 464 U.S. 965, 104 S.Ct. 404, 78 L.Ed.2d 344 (1983).

Because we find that Lonardo's statements were properly admitted under Rule

5. The Supreme Court denied certiorari in a case presenting this precise issue. *See Sanson v. United States*, — U.S. —, 104 S.Ct. 3559, 82 L.Ed.2d 861 (1984).

801(d)(2)(E), reliability is proved. Lonardo, the declarant and Bourjaily's codefendant, was unavailable because he refused to testify. In *Mayes v. Sowders*, 621 F.2d 850, 855 (6th Cir.), *cert. denied*, 449 U.S. 922, 101 S.Ct. 324, 66 L.Ed.2d 151 (1980), we stated:

> A witness is not available for full and effective cross-examination when he or she refuses to testify. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971). This is equally true whether the refusal to testify is predicated on privilege or is punishable as contempt, so long as the refusal to testify is not procured by the defendant. *Douglas v. Alabama*, *supra*, 380 U.S. at 420, 85 S.Ct. at 1077; *Motes v. United States*, 178 U.S. 458, 471, 20 S.Ct. 993, 998, 44 L.Ed. 1150 (1900); *United States v. Mayes*, 512 F.2d 637, 650–52 (6th Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975).

621 F.2d at 856. *See Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir.1983), *cert. denied*, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). Clearly, Lonardo's refusal to testify made him unavailable.

[6, 7] Bourjaily's final claim is that the evidence adduced at trial was insufficient to support a finding by the jury that conspiracy to distribute cocaine and possession of cocaine were proved beyond a reasonable doubt. The standard now generally applied in determining the sufficiency of the evidence at trial is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *United States v. Gallo*, 763 F.2d 1504, 1508 (6th Cir.1985). The essential elements of conspiracy are that the conspiracy was willfully formed, that the defendant willfully became a member of the conspiracy, and that one of the conspirators committed at least one overt act in furtherance of the conspiracy. *United States v. Thompson*, 533 F.2d 1006, 1009 (6th Cir.), *cert. denied*, 429 U.S. 939, 97 S.Ct. 353, 50 L.Ed.2d 308 (1976). For conviction, Bourjaily must have been shown to have agreed to participate in what he knew to be a joint venture to achieve a common goal. *United States v. Warner*, 690 F.2d 545, 549 (6th Cir.1982); *United States v. Martino*, 664 F.2d 860, 876 (2d Cir.1981), *cert. denied*, 458 U.S. 1110, 102 S.Ct. 3493, 73 L.Ed.2d 1373 (1982). However, actual agreement need not be proved. Drug distribution conspiracies are often "chain" conspiracies such that agreement can be inferred from the interdependence of the enterprise. *Warner*, 690 F.2d at 549; *United States v. Sutherland*, 656 F.2d 1181, 1195–96 (5th Cir.1981), *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982). One can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell. *Warner*, 690 F.2d at 549; *Martino*, 664 F.2d at 876. Circumstantial evidence is sufficient. *Thompson*, 533 F.2d at 1009.

[8, 9] Viewing the evidence before us in the light most favorable to the United States, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we hold that there was sufficient evidence from which the rational jury member could have found beyond a reasonable doubt that Bourjaily was a willful member of a conspiracy to distribute cocaine and that the accompanying overt acts were committed by the conspirators. The evidence established that Bourjaily took the cocaine from Lonardo in the Hilton parking lot. The additional evidence of Lonardo's actions in lining up buyers, and Lonardo's conversations with Greathouse is supportive of the conspiracy finding. Lonardo called Greathouse so that his "friend" could discuss the deal with him. Greathouse spoke with this "friend" about the quality of the cocaine. Lonardo later said "his friend" would be in the Hilton parking lot. Even if the evidence of Bourjaily taking the cocaine from

Lonardo is only evidence of a sale, there is additional evidence from which knowledge of the conspiracy may be inferred. *United States v. Grunsfeld*, 558 F.2d 1231, 1235 (6th Cir.1977), *cert. denied*, 434 U.S. 872, 98 S.Ct. 219, 54 L.Ed.2d 152 (1978). *United States v. Mayes*, 512 F.2d 637, 647 (6th Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975). Further, one kilogram of cocaine was involved. A large volume of narcotics creates an inference of a conspiracy. *Grunsfeld*, 558 F.2d at 1235; *United States v. Aiken*, 373 F.2d 294, 300 (2d Cir.), *cert. denied*, 389 U.S. 833, 88 S.Ct. 32, 19 L.Ed.2d 93 (1967).

[10] Likewise, a rational trier of fact could find that possession a necessary finding for a violation of 21 U.S.C. § 841(a)(1), was proved beyond a reasonable doubt. An FBI agent testified that he saw Lonardo give Bourjaily the cocaine and that Bourjaily accepted it. Immediately thereafter, Bourjaily was arrested and the cocaine was found in the passenger portion of his car. Bourjaily's contention that he did not know that the substance was cocaine is meritless in light of the money found in his car, Lonardo's statements, and the phone call Greathouse had with Lonardo's "friend."

We affirm.

Supreme Court of the United States

No. A-685

WILLIAM JOHN BOURJAILY,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1986.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 10th day of March, 1986.